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EXAMINER	
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Please find below and/or attached an Office communication concerning this application or proceeding.

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/725,786
Filing Date: December 01, 2003
Appellant(s): HAMER, DOUGLAS TAYLOR

**MAILED
OCT 25 2007
GROUP 3700**

John B. Hardaway, III
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed July 26, 2007 appealing from the Office action mailed February 15, 2007.

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(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

No amendment after final has been filed.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

4,981,468	Benefiel et al.	1-1991
5,045,195	Spangrud et al.	9-1991

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(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 103

Claim 17 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Benefiel et al. in view of Spangrud et al.

Benefiel et al. disclose a beverage dispenser comprising a semi-rigid hollow straw having two open ends, the straw having sidewalls with a minimum thickness and the straw being substantially open from end to end, and removable end caps 36 on each of the two open ends, and the dispenser being filled with an agent 20 comprising a liquid/suspension formulation (column 5, line 47). Benefiel et al. do not disclose the thickness of 0.02 inch, the beverage as recited, or the method of using the dispenser as recited. Spangrud et al. teaches a beverage dispenser comprising a straw having sidewalls with a thickness of about 0.035 inch. It would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified the device of Benefiel et al. by making the sidewall thickness to be a minimum thickness of 0.02 as taught by Spangrud et al. in order to form a more durable dispenser. Regarding the method of using the device, it has been held that a recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus satisfying the claimed structural limitations and the types of beverages as recited would have been a matter of design choice since such a modification would have involved a mere change in the agent of Benefiel et al., which is generally as being within the level of ordinary skill in the art. In

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addition, it has been held that the functional “whereby” statement does not define any structure and accordingly cannot serve to distinguish. In re Mason, 114 USPQ 127, 44 CCPA 937.

(10) Response to Argument

The combination of Benefiel et al. and Spangrud et al. disclose the structural limitations of the instant invention. Benefiel et al. also disclose that their device can be used to administer liquid/suspension formulations (column 5, lines 45-49) which meets the limitation of slushes and precursors. Furthermore, the device can be used to dispense a particular beverage since it has been held that a recitation with the respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus satisfying the claimed structural limitations. If it is a liquid and it is ingested, such a liquid can be considered to be a “beverage.” Since the device of Benefiel et al. and Spangrud et al. is actually a stand alone device 210 as seen in Figure 6 of Benefiel et al., the device does not have to be connected to a straw to work. It would have been obvious to one having ordinary skill in the art that the device can be used to dispense agent 20 by itself without being connected to a straw. The embodiment as shown in Figure 6 of Benefiel et al. also discloses a straw being substantially open from end to end and in order for the agent 20 to be dispensed, and a positive pressure can be applied at one end and a negative pressure applied at the other end as formed by one blowing at one end and another sucking at the other end since both ends are open once the caps are removed. Since the device comprises removable caps on both ends, either end can be used to dispense

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the agent. Column 6, lines 22-30 only states that the device **can** (but does not have to) include a one-way valve, but further states that the use of such a valve is not a critical component of the device. Spangrud et al. teaches a straw having sidewalls with a thickness of about 0.035 inches (column 3, line 42) and thus teaches a minimum thickness of 0.02 inches. Having a thicker sidewall will make the device more sturdy and help the device to resist collapse when exposed to various pressures. And finally, it has been held that the functional "whereby" statement does not define any structure and accordingly cannot serve to distinguish.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



Davis Hwu, Primary Examiner

October 23, 2007

Conferees:

Kevin Shaver

Robin Evans

